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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. 259 [redacted]

KENNEDY BOOK STORE, INC., - - Petitioner,

versus

DEPARTMENT OF REVENUE;
DEPARTMENT OF REVENUE, EX REL. JAMES E. LUCKETT, Commissioner of Revenue; and
KENTUCKY BOARD OF TAX APPEALS, - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

WILLIAM E. SCENT,
REED, SCENT & WALTON,
621 Broadway,
Paducah, Kentucky 42001,

CLAY SHACKELFORD,
SHACKELFORD, BURNAM & THOMPSON,
Professional Building,
Richmond, Kentucky 40475,

Counsel for Petitioner.

June , 1970.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. _____

KENNEDY BOOK STORE, INC., - - - *Petitioner,*

v.

DEPARTMENT OF REVENUE;
DEPARTMENT OF REVENUE, EX REL. JAMES E. LUCKETT, Commissioner of Revenue;
JAMES E. LUCKETT, Commissioner of Revenue; and
KENTUCKY BOARD OF TAX APPEALS, - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

The petitioner, Kennedy Book Store, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Kentucky entered in this proceeding on February 6, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals of Kentucky is officially reported in 450 S. W. 2d 524, and a copy appears in the Appendix hereto. The opinion of the Fayette Circuit Court was not reported. A copy thereof is contained in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals of Kentucky was entered on February 6, 1970. A timely petition for rehearing was denied on March 20, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED.

Whether the refusal of the Kentucky Department of Revenue to grant petitioner the identical relief from Kentucky sales tax that it accorded to petitioner's only competitor in contravention of the department's own regulations was a violation of petitioner's rights to Equal Protection of the Laws under the 14th Amendment to the Constitution.

STATUTORY PROVISIONS INVOLVED.

14th Amendment . . . . . Appendix, p. 29
Section 170 of the Kentucky Constitution . . . . . Appendix, p. 30
KRS 139.200 (imposition of sales tax) . . . . . Appendix, p. 30
KRS 139.210 (collection by retailer from consumer) . . . . . Appendix, p. 31
KRS 139.310 (imposition of use tax) . . . . . Appendix, p. 31
KRS 139.470(1) (exemptions from tax) . . . . . Appendix, p. 31

Sales and Use Tax Regulations:
SU 12-1 (educational institutions) ..... Appendix, pp. 31-32
SU 14-1 (religious institutions) ..... Appendix, pp. 33-35
SU 38 (sales to state and local agencies) ..... Appendix, p. 35
SU 90 (deductions for sales to exempt purchasers) .... Appendix, pp. 35-37

STATEMENT OF THE CASE.

This case arises out of Kentucky's enactment and respondent Department of Revenue's administration of a three percent (3%) general sales and use tax that became effective on July 1, 1960. The representative tax period involved is 1/1/63 through 11/30/64 and the tax in controversy for that period is $21,600.82. Petitioner's business is the operation of a college bookstore; i.e., it sells textbooks, workbooks, classroom aids, etc., to college students and faculty.

The petitioner, Kennedy Book Store, Inc., (herein called "Kennedy") has operated an off-campus college bookstore across the street from the campus of the University of Kentucky (herein called "U.K.") since 1950. Its only competitor has been a college bookstore situated on the U.K. campus. Until June 28, 1964, the latter bookstore was privately operated by an individual under a lease arrangement with U.K. On that date its operation was taken over by U.K. for the purpose of avoiding the imposition of Kentucky's 3% sales tax.

At the time the Kentucky sales tax became effective on July 1, 1960, Kennedy's manager maintained close contact with the individual operating the U.K. campus bookstore to insure that both stores would operate identically with respect to the sales tax. In the beginning both bookstores collected the sales tax from customers and remitted it to the Revenue Department on all sales. However, U.K. officials thereafter directed the individual (James Morris) operating the campus bookstore to cease collecting sales tax from students and faculty on sales of "essential educational" items (e.g., textbooks, workbooks, classroom aids). As a result, Mr. Morris commenced collecting sales tax only on his sales of "non-educational" items (e.g., tobaccos, sundries) and Kennedy did likewise. Later, the Revenue Department informed both Morris and Kennedy that sales tax must be charged on all sales or not at all. Morris then ceased collecting sales tax on sales of "non-educational" items and Kennedy again did likewise. When Morris complained to U.K. officials that he was being forced to absorb the sales tax on his receipts from all sales, a compromise was effected between U.K. and Morris whereby he paid one-half of the sales tax and U.K. the other one-half. Shortly thereafter U.K. terminated Morris' lease and took over the operation of the campus bookstore.

From then on the Revenue Department required the U.K. bookstore to pay sales tax only on its sales of "non-educational" items while requiring Kennedy to pay sales tax on all of its sales. In order to compete with the U.K. bookstore Kennedy was forced to ab-

sorb the 3% sales tax on all its sales and did not pass it along to its customers.

Kennedy appealed the Revenue Department's ruling that it was liable for sales tax on all its sales to the Kentucky Board of Tax Appeals. At a *de novo* hearing before that body the foregoing facts were developed. In addition, evidence was introduced that established that Kennedy's bookstore operations were identical to U.K. in the following respects:

1. Each store depends on U.K. students and faculty for most of its business;

2. Each store derives more than ¾ of its total receipts from sales of "essential educational" items to U.K. faculty and students;

3. Each store buys and resells "essential educational" items at identical prices;

4. Each store supplies approximately 50% of the total "essential educational" items purchased by U.K. students and faculty;

5. Each store's sales to the general public account for less than 5% of its total sales;

6. Neither store has collected sales tax on any retail sales;

7. Each store has absorbed and paid to the Department sales tax on its sales of "non-educational" items;

8. Each store is operated for profit (U.K.'s store earned a profit of $89,000.00 in the 1964-65 fiscal year).

The Revenue Department contended that because the U.K. bookstore was owned and operated by U.K. it did not have to pay sales tax on its sales of "essential educational" items; but that Kennedy was sub-

ject to sales tax on all of its sales because it was privately owned and operated.

Although the respondents introduced no proof at the hearing before the Board of Tax Appeals, that body affirmed the final ruling of the Revenue Department and upheld the assessment. Petitioner appealed the final order of the Board of Tax Appeals to the Fayette Circuit Court. It alleged in its petition for appeal the following:

> "B. The Board erred in failing to hold, under the facts presented, that the Department of Revenue has denied the appellant the 'Equal Protection of the Laws' in taxing appellant on its sales of essential educational items while exempting from the sales tax receipts from sales of essential educational items made by book stores owned by the University of Kentucky and all other Kentucky colleges, both public and private.
>
> "C. The Board erred in refusing to hold, under the facts presented, that the Department of Revenue's failure to enforce Regulation SU 12-1 against appellant's only competitor, the University of Kentucky book store, must result in voiding the additional sales tax assessed against appellant in order to afford appellant the 'Equal Protection of the Laws'."

The Fayette Circuit Court entered judgment affirming the order of the Board of Tax Appeals saying, in a separate opinion, that:

> "The appellant next raises the argument that the Department has acted unreasonably, discrim-

inatorily and arbitrarily in refusing to extend to the appellant the benefits of its regulations relating to educational institutions and in its enforcement of said regulation so as to deny appellant his constitutional right of equal protection of the laws under both the United States Constitution and the Kentucky Constitution. There is no evidence in the record that the Department of Revenue acted unreasonably, discriminatorily or arbitrarily in the adoption of Regulation SU 12-1.

"As to the enforcement of Regulation SU 12-1, the appellant raises the point that in order to be exempt from the sales tax the University of Kentucky bookstore should not be open to the general public as stated in the regulation. The evidence establishes that both the University of Kentucky bookstore and Murray University bookstores are open to the general public. There is no evidence in the record, however, to indicate that the Department of Revenue was aware that these bookstores were open to the general public and we do not feel that because of some failure on the part of the Department of Revenue to strictly enforce Regulation SU 12-1 it would indicate any discrimination against the appellant so as to relieve it of its obligation to pay the sales tax under the applicable statute."

On appeal to the Court of Appeals of Kentucky petitioner raised the following 14th Amendment issue in its original brief:

"*Question No. 1:* Has the Department Violated Section 2 of the Kentucky Constitution and

the Equal Protection Clause of the U. S. Constitution in Refusing to Grant Administrative Relief to Kennedy?"

On February 6, 1970, the Court of Appeals issued its opinion affirming the judgment of the Fayette Circuit Court stating:

> "Kennedy contends that the precepts of City of Ashland v. Heck's Inc., Ky., 407 S. W. 2d 421, and Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, impel the conclusion that the Department has discriminated against it by reason of its disparate administration of the sales-tax regulations. We are not so persuaded.
>
> "If UK is entitled to exemption by virtue of Section 170 of the Kentucky Constitution (which Kennedy seems to concede), then Kennedy has no ground for complaint, because it is obvious that the constitution extends no exemption to Kennedy. We cannot characterize the Department's exemption of UK, based on the Department's belief as expressed in its brief (and assumed by Kennedy) that UK is exempted by Section 170 of the Kentucky Constitution, as arbitrary or as resulting in a proscribed discrimination.
>
> "Neither is there any basis for deeming arbitrary the Department's administration of SU-1 because of UK's sales of five percent to the general public. In the first place, there was no showing that the Department had knowledge of UK's sales to the general public; hence, its actions respecting the regulation could hardly be deemed 'deliberate' or 'willful.' The relatively small amount of sales to the general public is 'de minimis' and

does not sustain a claimed course of arbitrary action, or nonaction, by the Department. Obviously, if UK is an exempt vendor, the Department may not require it to pay any sales tax on any of its sales. We express no opinion as to the validity of any of the Department's regulations to which we have adverted."

REASONS FOR GRANTING THE WRIT.

The Decision Below Presents a Substantial Question Under the Equal Protection Clause of the 14th Amendment Because Its Result Was to Grant a Shockingly Unfair and Unjust Competitive Advantage to the Petitioner's Only Competitor.

At the time the Kentucky sales tax became effective, the petitioner bookstore's only competitor was a privately operated (under lease from U.K.) on-campus bookstore. Both petitioner and his aforesaid competitor originally collected sales tax on all retail sales and remitted the tax to the Revenue Department. Despite the fact that under KRS 139.210 the retailer is given the right to collect the sales tax from its purchasers, U. of K. officials intervened and directed the lessee operator of the campus bookstore to cease collecting sales tax on the store's sales of "essential educational items." As a result, both U. K.'s lessee and petitioner commenced charging sales tax only on their respective sales of "non-educational items." However, at that point the respondent Department of Revenue stepped in and directed the lessee and the petitioner to either collect sales tax on all sales or none. For a while thereafter U. K. paid one-half of its lessee's sales tax liability.

However, in the end it canceled the lease; took over operation of the campus bookstore and thereby became the petitioner's only competitor; ceased paying sales tax on its sales of "educational items;" and made $89,000.00 profit during its first 12 months of operation.

The respondent Department of Revenue did not require the U. K. bookstore (after U. K. took over its operation) to pay sales tax on its sales of "educational items," despite the fact that it was open to the general public in violation of the respondent Revenue Department's own regulation SU 12-1 (Appendix, pp. 31-32). In this regard, the Court of Appeals of Kentucky's finding that "the relatively small amount of sales to the general public is 'de minimis' and does not sustain a claimed course of arbitrary action or non-action by the Department" may be reviewed by this Court. As stated in *Hooven & Allison Co.* v. *Evatt*, 65 S. Ct. 870, 874, 324 U. S. 652, 659:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to re-examine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained."

See also *Kern-Limerick, Inc.* v. *Scurlock*, 74 S. Ct. 403, 410, 347 U. S. 110, 121.

Further proof that the respondent Revenue Department's refusal to grant this petitioner administrative relief equal to that extended to petitioner's only competitor (*i.e.*, the state-owned bookstore) was shockingly wrong is found in the unusually broad powers it has otherwise exercised in administering Kentucky's Sales and Use Tax Act.

Despite the fact that the Court of Appeals of Kentucky in *Marcum* v. *City of Louisville Municipal Housing Com'n.*, Ky., 374 S. W. 2d 865, 866, 869 (1964), held that:

> ". . . It is just as apparent the legislature intended to place the legal incidence of the sales tax on the retailer, even though the economic burden might be passed on to the consumer.
>
> ". . . We have shown that the sales tax is not a tax upon the appellee, and appellee is not exempt from bearing the burden of the tax which may be passed on to it by a utility company . . .,"

The respondent Revenue Department in its Regulation SU 90 (Appendix, pp. 35-37) exempted private retailers from the sales tax otherwise due on their sales to charitable and educational institutions and hospitals; stating in the Regulation's preamble that:

> "The intent of this regulation is to reconcile administration by the Department of Revenue of the provisions of Chapter 139, Kentucky Revised Statutes, as they apply to sales by retailers to institutions of purely public charity, non-profit charitable hospitals, institutions of education, and exempt federal agencies with the *requirements of*

the Fourteenth Amendment to the Constitution of the United States and of Section 170 of the Constitution of Kentucky." (Emphasis added.)

In the case of "any church . . . its agencies and its parent or governing body" the respondent Revenue Department's Regulation SU 14-1 (Appendix, pp. 33-34) exempted retailers from sales tax on their sales to such religious purchasers. It was adopted in the face of the limited exemption contained in KRS 139.470 (Appendix, p. 31) and Section 170 of the Kentucky Constitution. (Appendix, p. 30) and the latter's strict construction by the Court of Appeals of Kentucky:

> "It runs throughout the cases discussed above that the exemption accorded property used for religious purposes under Section 170 of our Constitution is to be construed strictly; whereas, the exemption accorded charitable and educational institutions construed liberally . . . ." *City of Ashland* v. *Calvary Protestant Episcopal Ch.*, Ky., 1955, 278 S. W. 2d 708, 712.

At the other extreme the respondent Revenue Department provided in Regulation SU 38 (Appendix, p. 35) that:

> "Sales to and by the state, its agencies and instrumentalities, and its political subdivisions (*e.g.*, counties and municipalities) must be included in the taxable gross receipts of the seller."

In the face of the foregoing, the petitioner has been denied equal tax treatment with its only competitor—a state-owned bookstore. Equality of treatment could

have been achieved either by requiring the state-owned competitor to pay sales tax on all of its sales or by exempting petitioner to the same extent that its only competitor was exempt.

The failure to so do was a gross violation of petitioner's right to equal protection of the laws.

CONCLUSION.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

WILLIAM E. SCENT,
REED, SCENT & WALTON,
621 Broadway,
Paducah, Kentucky 42001,

CLAY SHACKELFORD,
SHACKELFORD, BURMAN & THOMPSON,
Professional Building,
Richmond, Kentucky 40475,

Counsel for Petitioner.

June , 1970.

COURT OF APPEALS OF KENTUCKY

RENDERED: FEBRUARY 6, 1970

File No. W-199-68

KENNEDY BOOK STORE, INC., - - - - - *Appellant,*

v.

DEPARTMENT OF REVENUE, ETC., ET AL., - *Appellees.*

Appeal from Fayette Circuit Court,
Honorable I. T. Grant, Judge.

OPINION OF THE COURT BY COMMISSIONER DAVIS—AFFIRMING.

The appellant challenges a judgment upholding an order of the Kentucky Board of Tax Appeals which sustained a deficiency sales-tax assessment against it in the amount of $21,600.82 for the period of January 1, 1963, through November 30, 1964. It will be necessary to relate some of the factual background before discussing the specific questions raised on the appeal.

The appellant (Kennedy) operates a book store adjacent to the campus of the University of Kentucky at Lexington. The University of Kentucky (UK) operates a book store on its campus. Each of these stores derives more than three-fourths of its total retail receipts from sales of required textbooks and other essential educational items to students and faculty members of UK. Only about five percent or less of the total retail receipts of either store results from sales to the general public, as distinguished from the students and faculty of UK. Both stores have operated prof-

itably and have offered merchandise at competitive and substantially identical prices. Neither store has collected sales tax from its customers on any of its retail sales, but each of them has absorbed and paid the sales tax computed on the gross sales of noneducational items such as clothing, phonographs, and the like.

Kennedy asserts that two questions are at issue:

(1) "Has the Department violated Section 2 of the Kentucky Constitution and the Equal Protection Clause of the U. S. Constitution in refusing to grant administrative relief to Kennedy?"

(2) "Is Kennedy entitled to be relieved of sales tax on its receipts from sales of essential educational items by reason of the Department's failure to enforce SU 12-1 against institutional book stores?"

Kennedy points out that its operations are essentially the same as UK's as respects identity of patrons, type of business, and receipts. It correctly observes that the sales tax provided by KRS Chapter 139 is levied on the vendor, whereas the use tax imposed by the same chapter falls upon the vendee. Marcum v. City of Louisville, Ky., 374 S. W. 2d 865.

Kennedy then refers to various regulations promulgated by the Department, only one of which is directly involved in the present case. By virtue of Regulations SU 90, SU 12-1, SU 38, and SU 14-1, the Department has undertaken to afford exemptions from the incidence of the sales tax in varying circumstances. In summary, SU 90 purports to relieve retailers of sales-tax liability as to receipts from sales to charitable and educational institutions in certain situations. SU 12-1 prescribes sales-tax immunity as to the gross receipts from sales by an institution of education, with specified limitations. SU 12-1 contains as an "exam-

ple" of an exempt activity by an institution of education: "School book and supply stores which are managed and operated by and as a part of the school and are not open to the public." Even such an operation is not exempted as to receipts from sales of merchandise "outside of the educational function."

SU 38 tersely notes that sales to and by the state, its agencies and instrumentalities, and its political subdivisions must be included in the taxable gross receipts of the seller, whereas SU 14-1 provides for exclusion of a vendor's receipts arising from sales to religious institutions.

Kennedy contends that the obvious purpose of the regulations is to afford protection to Kentucky retailers from the competitive disadvantages which would result from a vendor-type sales tax without the regulations. The difficulty, from Kennedy's point of view, is that no regulatory relief has been extended to it, even though it has to compete with UK to which administrative relief has been afforded. Moreover, says Kennedy, UK's book-store operation does not earn any sales-tax exemption by virtue of SU 12-1 because UK does sell at least five percent of its merchandise to the general public.

The thrust of Kennedy's argument appears to be: Since the Department, by the various regulations discussed, has undertaken to effect tax relief for some taxpayers, when adversely affected because of competition involving "exempt" vendors and "exempt" vendees, its failure to provide such relief for Kennedy is arbitrary within the contravention of Kentucky Constitution Section 2 and violative of the equal-protection clause of the Fourteenth Amendment of the United States Constitution. In taking this approach Kennedy *assumes*, as does the Department, that UK is an exempt vendor because of Section 170 of the Kentucky Constitution. Although we need not and do not resolve that

question, we note that Kennedy's assumption that UK is an exempt vendor by virtue of Section 170 of the Kentucky Constitution relieves us of the necessity of exploring that matter in this case.

Kennedy contends that the precepts of City of Ashland v. Heck's Inc., Ky., 407 S. W. 2d 421, and Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, impel the conclusion that the Department has discriminated against it by reason of its disparate administration of the sales-tax regulations. We are not so persuaded.

If UK is entitled to exemption by virtue of Section 170 of the Kentucky Constitution (which Kennedy seems to concede), then Kennedy has no ground for complaint, because it is obvious that the constitution extends no exemption to Kennedy. We cannot characterize the Department's exemption of UK, based on the Department's belief as expressed in its brief (and assumed by Kennedy) that UK is exempted by Section 170 of the Kentucky Constitution, as arbitrary or as resulting in a proscribed discrimination.

Neither is there any basis for deeming arbitrary the Department's administration of SU 12-1 because of UK's sales of five percent to the general public. In the first place, there was no showing that the Department had knowledge of UK's sales to the general public; hence, its actions respecting the regulation could hardly be deemed "deliberate" or "willful". The relatively small amount of sales to the general public is "de minimis" and does not sustain a claimed course of arbitrary action, or nonaction, by the Department. Obviously, if UK is an exempt vendor, the Department may not require it to pay any sales tax on any of its sales. We express no opinion as to the validity of any of the Department's regulations to which we have adverted.

We have not discussed and do not decide the Department's claim that the issue at bar has been foreclosed by a previous administrative ruling.

The judgment is affirmed.

All concur.

Attorneys for Appellant:

WILLIAM E. SCENT,
REED, SCENT & REED,
513 Citizens Bank Building,
Paducah, Kentucky 42001,

CLAY SHACKELFORD,
SHACKELFORD, BURNAM & THOMPSON,
Professional Building,
Richmond, Kentucky 40475.

Attorneys for Appellees:

JOHN B. BRECKINRIDGE,
Attorney General,
State Capitol,
Frankfort, Kentucky 40601,

WILLIAM S. RILEY,
Assistant Attorney General,
Department of Revenue,
Frankfort, Kentucky 40601,

LARRY A. CARVER,
Department of Revenue,
Frankfort, Kentucky 40601.

MANDATE.

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

DICK VERMILLION, C. C. A.
By (s) John C. Scott, D. C.

Issued March 20, 1970.

FAYETTE CIRCUIT COURT

Civil Action No. 20423

KENNEDY BOOK STORE, INC., - - - - - *Appellant,*

v.

DEPARTMENT OF REVENUE,
DEPARTMENT OF REVENUE, EX REL. JAMES E. LUCKETT, Commissioner of Revenue, and
JAMES E. LUCKETT, Commissioner of Revenue, - - - - - - - - - *Appellees.*

PETITION OF APPEAL PURSUANT TO KRS 131.370 FROM ORDER No. K-781 OF THE KENTUCKY BOARD OF TAX APPEALS.

Comes the appellant, Kennedy Book Store, Inc., a corporation, and for its petition of appeal pursuant to KRS 131.370 from Order No. K-781 of the Kentucky Board of Tax Appeals, states the following:

1. Appellant is a corporation residing in Fayette County, Kentucky, and conducts its place of business in Lexington, Fayette County, Kentucky.

2. An attested copy of the final order of the Kentucky Board of Tax Appeals appealed from is annexed hereto as "Exhibit A." Said order became final on March 23rd, 1967, and this appellant is and was aggrieved by said final order.

3. A copy of this petition for appeal has been filed with the Kentucky Board of Tax Appeals by mailing, pos-

tage prepaid, on this ____ day of April, 1967, a copy hereof by registered mail, return receipt requested, to:

Kentucky Board of Tax Appeals
New Capitol Annex Building
Frankfort, Kentucky 40601

attached to a letter requesting that it be filed.

4. A copy of this petition for appeal has been filed with the appellees herein by mailing, postage prepaid, on this ____ day of April, 1967, a copy hereof by registered mail, return receipt requested, to:

James E. Luckett
Commissioner of Revenue
Kentucky Department of Revenue
New Capitol Annex Building
Frankfort, Kentucky 40601,

attached to a letter requesting that it be filed.

5. The grounds upon which review is sought are as follows:

A. The Board erred as a matter of law in failing to make written findings as required under KRS 131.160.

B. The Board erred as a matter of law in basing its order herein appealed from on Kentucky Tax Commission Order No. 3517, entered on June 26, 1964.

C. The Board erred as a matter of law in affirming the assessment of additional sales tax against appellant by the Department of Revenue in the amount of $21,600.82, or in any amount.

6. The errors relied on by appellant are as follows:

A. The Board's Order No. K-781 does not comply with the requirements of KRS 131.160 that: "The Kentucky Board of Tax Appeals shall make written findings on which its orders * * * are based." Among the findings the Board failed to make, that are required under the testimony and exhibits received in evidence before the Board are:

i. During the period involved the appellant did not collect any sales or use tax from its customers on any of its sales by means of the bracket system or any other method.

ii. During the period involved all book stores operated by both private and public colleges and universities in Kentucky were open to business from the general public and did do business with members of the general public.

iii. During the period involved the appellant performed services for students and faculty of the University of Kentucky that were identical to those rendered to said students and faculty by the book store owned and operated by the University of Kentucky.

iv. During the period involved the appellant's only business competitor was then the bookstore owned and operated by the University of Kentucky.

v. During the period involved the appellant paid sales tax on its receipts from sales of non-essential items to its customers.

vi. During the period involved, all book stores owned and operated by colleges and universities, both public and private, were required by the Department of Revenue to pay sales tax only on their respective receipts from sales of non-essential items.

vii. During the period involved, all book stores owned and operated by colleges and universities, both public and private, were operated for the primary purpose of making a profit.

viii. Except in the instance of this appellant, the Department of Revenue has not hesitated to grant relief by administrative action to Kentucky retailers threatened with competition from retailers exempt from collecting or paying the sales and use tax, where such competition was the result of the sales and use tax.

ix. The failure of the Department of Revenue to accord this appellant the same treatment it accords to the book store owned and operated by the University of Kentucky has, in effect, resulted in this appellant being required to pay sales taxes to support its only competitor.

B. The Board erred in failing to hold, under the facts presented, that the Department of Revenue has denied the appellant the "Equal Protection of the Laws" in taxing appellant on its sales of essential educational items while exempting from the sales tax receipts from sales of essential educational items made by book stores owned by the University of Kentucky and all other Kentucky colleges, both public and private.

C. The Board erred in refusing to hold, under the facts presented, that the Department of Revenue's failure to enforce Regulation SU 12-1 against appellant's only competitor, the University of Kentucky book store, must result in voiding the additional sales tax assessed against appellant in order to afford appellant the "Equal Protection of the Laws."

D. The Board erred in refusing to hold that the Department of Revenue acted arbitrarily and unreasonably in refusing to grant to appellant the benefits of its established administrative policy of protecting private Kentucky retailers from competition emanating from the tax exemption contained in Section 170 of the Kentucky Constitution.

Wherefore appellants demand: that summons issue directing the Department of Revenue to answer within twenty days after service thereof and directing the Kentucky Board of Tax Appeals to transmit its entire original record, properly certified, to the Clerk of the Fayette Circuit Court, after certifying that such record is the entire original record; that this Court review said record in accordance with the provisions of KRS 131.170 and grant to

this appellant all relief to which it may appear entitled; and its costs herein expended.

Shackelford, Burnam & Thompson
Richmond, Kentucky
By: Clay Shackelford

Reed, Scent & Reed
513 Citizens Bank Building
Paducah, Kentucky
By: William E. Scent
Attorneys for Appellant

OPINION.

This case is before the court on an appeal taken pursuant to KRS 131.370 from a final order of the Kentucky Board of Tax Appeals (hereinafter referred to as the Board) entered on March 23, 1967. Said order upheld a ruling of the Department of Revenue assessing the appellant for a sales tax deficiency in the sum of $21,600.82 plus interest for the period January 1, 1963 through November 30, 1964.

A formal hearing was held in this case before the Board but we fail to find any controversy relating to the facts of this case.

In their findings of fact the Board found that the appellant was a private corporation which operated an "off campus" bookstore across the street from the campus of the University of Kentucky in Lexington, Kentucky, and its customers primarily consisted of teachers employed by and students of the University of Kentucky.

The Board further found that the sales and use tax law or the Kentucky constitution did not exempt the appellant from the payment of sales tax on merchandise sold by it.

The record before the court reveals that the appellant, in an effort to remain competitive with the University of

Kentucky bookstore, does not pass on the sales tax to its customers under the bracket system but does pay a sales tax on what it determines as the sale of non-essential items. These items consist of merchandise which is not ordinarily used in the classroom at the University of Kentucky. The appellant paid no sales tax on what it determined to be the sale of essential items or merchandise used in the classroom at the University of Kentucky.

The University of Kentucky bookstore likewise does not collect a sales tax from its customers under the bracket system but pays the sales tax on what it determines as the sale of non-essential items but pays no sales tax on what it determines as the sale of essential items or merchandise used in the classroom at the University of Kentucky.

Subsequent to the enactment of KRS Chapter 139, the Department of Revenue adopted a regulation SU 12-1 pursuant to KRS 131.130 which exempted from the sales tax gross receipts from sales by institutions of education if such sales were made directly within their function as an educational institution. A campus bookstore which was managed and operated by and as a part of the school and was not open to the general public was cited as an example of sales which would be exempted in the regulation.

The appellant raises several points to sustain its position that it should be relieved of payment of the sales tax on the sale of essential items used in the classroom at the University of Kentucky.

The first point raised by the appellant is that the Board failed to make written findings of fact which it contends was necessary under KRS 131.370. The Board did make sufficient findings of fact for the purposes of this case. We are of the opinion that there is no factual issue in controversy. The primary issue as we see it in this case is the legality of the adoption of Regulation SU 12-1 and the effect of its enforcement upon the appellant. These questions are more of a legal nature than of a factual nature.

Having found that the Board did make sufficient findings of fact in this particular case, there is no authority for the circuit court to remand the case to the Board to make findings of fact or take additional proof.

The appellant next argues that it should be relieved of its obligations under the sales tax law because the operation of its store is substantially the same as the University of Kentucky and Murray University bookstores.

Most of the evidence introduced in this case is directed to the method of operation of the appellant's bookstore and the University of Kentucky and Murray University bookstores. We agree that the operation of the bookstores are substantially identical but we feel that the main distinction is in the ownership of the stores. The appellant's bookstore is not owned by an educational institution. It is a private corporation and Regulation SU 12-1 exempts educational institutions but does not exempt private corporations. The sales tax is not a tax on the buyer but a tax on the seller imposed on the privilege of selling goods at retail. See *Marcum* v. *City of Louisville Municipal Housing Commission*, Ky., 374, S. W. 2d 865. It is the ownership of the bookstore that is controlling rather than its method of operation.

The next point raised by the appellant is that the Department has amended KRS Chapter 139 by regulations. The appellant sets out several regulations that have been adopted by the Department of Revenue in regard to the sales and use tax but the only regulation that has a bearing on this case is Regulation SU 12-1. We are of the opinion that the Department had the authority to issue said regulation under the applicable statutes and constitutional provision. Whether or not the other regulations cited by the appellant were proper is not relevant to the issue in this case and they will not be discussed in this opinion.

The appellant next raises the argument that the Department has acted unreasonably, discriminatorily and arbitrarily in refusing to extend to the appellant the benefits of its regulations relating to educational institutions and in its enforcement of said regulation so as to deny appellant his constitutional right of equal protection of the laws under both the United States Constitution and the Kentucky Constitution. There is no evidence in the record that the Department of Revenue acted unreasonably, discriminatorily or arbitrarily in the adoption of Regulation SU 12-1.

As to the enforcement of Regulation SU 12-1, the appellant raises the point that in order to be exempt from the sales tax the University of Kentucky bookstore should not be open to the general public as stated in the regulation. The evidence establishes that both the University of Kentucky bookstore and Murray University bookstore are open to the general public. There is no evidence in the record, however, to indicate that the Department of Revenue was aware that these bookstores were open to the general public and we do not feel that because of some failure on the part of the Department of Revenue to strictly enforce Regulation SU 12-1 it would indicate any discrimination against the appellant so as to relieve it of its obligation to pay the sales tax under the applicable statute.

As stated in the case of *City of Ashland, et al.* v. *Heck's Inc.*, Ky., 407 S. W. 2d 421, no law ever has been or will be enforced uniformly or without exception and in order to obtain relief under equal protection clause of both the United States Constitution and the Kentucky Constitution, there must be a showing that there has been obvious and flagrant discrimination in the enforcement of a law. There is no such showing in this case.

Because we are affirming the ruling of the Board, we do not feel it necessary to determine whether or not a prior

order of the Kentucky Tax Commission issued June 26, 1964, was res judicata as to the issues raised on this appeal.

We fail to find any legal authority whereby the Department of Revenue could grant the tax relief sought by the appellant. While this might be a hardship on the appellant under the provisions of the applicable statute, constitution and regulations, we do not believe that the Department of Revenue has any authority to grant a tax exemption to the appellant. It would appear that any relief to appellant would have to be done by legislation.

In view of the above, we are of the opinion that the order of the Kentucky Board of Tax Appeals should be affirmed. The Clerk is directed to make this opinion a part of the record herein and the attorneys will prepare a judgment in accordance with same.

(s) L. T. Grant,
Judge, Fayette Circuit Court.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF KENTUCKY.

Section 170.

There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education, public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods of a person used in his home; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or committing property from taxation other than the property above mentioned shall be void. The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location.

KENTUCKY REVISED STATUTES.

KRS 139.200:

For the privilege of making "retail sales" or "sales at retail", a tax is hereby imposed upon all retailers at the rate of three percent of the gross receipts of any retailer derived from "retail sales" or "sales at "retail" made within this state after June 30, 1960.

KRS 139.210:

The taxes herein imposed may be collected by the retailer from the consumer.

KRS 139.310:

An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased on or after July 1, 1960, for storage, use or other consumption in this state at the rate of three percent of the sales price of the property."

KRS 139.470:

There are excluded from the computation of the amount of taxes imposed by this chapter:

(1) Gross receipts from the sale of, and the storage, use or other consumption in the state of, tangible personal property the gross receipts from the sale of which, or the storage, use or other consumption of which, this state is prohibited from taxing under the Constitution or laws of the United States, or under the Constitution of this state; . . .

KENTUCKY SALES AND USE TAX REGULATIONS.

SU 12-1:

Educational Institutions. 1. *Generally*—The term "institution of education" as used in this regulation means a resident, nonprofit school, college, or university, the income of which is devoted solely to education, and where systematic instruction in any and all of the useful branches of learning is given by methods common to schools and institutions of learning. This definition does not include schools for teaching dancing, dramatics, music, riding, gymnastic exercises, and other special accomplishments, nor does this definition include parent-teacher associations, parents' groups, alumni or other such auxiliary organizations with

purposes related to the educational function of an institution or collective group of institutions. No distinction is to be made between public, private, or parochial schools when the determination is made as to whether a particular school comes within the definition.

2. *Sales Tax*—Gross receipts from sales by an institution of education are exempt, if made directly within their function as an educational institution. Examples of activities outside of the educational function would be the sale to the general public of articles resulting from student industries; sales of food and soft drinks by school cafeterias or grills open to the general public; and sales of food, soft drinks, or other property which are incidental to regularly scheduled group meetings the primary purpose of which is purely recreational or social. Even though activities or events may be within the educational function, it does not necessarily follow that the gross receipts from all sales in conjunction therewith would be nontaxable; distinction may be made in regard to those events where the general public is in attendance, and those events where it is not. The following rules are applicable:

(a) Where the general public is invited to an event or activity, gross receipts from sales of admissions to students are not subject to the sales tax, provided however, that the charge for such admissions is prepaid by students as an includable item of tuition, or that the sales are otherwise made direct by the school acting in its own capacity, and in advance of the scheduled event. All sales to the general public, and all sales at the gate, including those to students, of admissions are subject to sales tax. Gross receipts from incidental sales of food, candy, drinks, and other items of property are taxable. The test in the latter situation is whether gross receipts from sales of any of the admissions are subject to tax. Examples of activities where the general public may be invited are school plays, athletic events, lecture series, film and other exhibits, and concerts.

(b) Where activities or events are attended only by students, teachers, instructors, or professors, or combinations thereof, and which are not open to the general public, neither admissions nor incidental sales of food, soft drinks nor primary sales of other property are subject to the sales tax if the activity is within the educational function. Examples are cafeterias which are managed and operated by and as a part of the school and which are not open to the general public and which serve only students, teachers, and employees of the school; school book and supply stores which are managed and operated by and as a part of the school and are not open to the general public (however, gross receipts from sales which are outside of the educational function, such as sales of drugs, cosmetics, clothing and other wearing apparel, jewelry, etc., are subject to the tax); purely student or teacher events where the primary object is within the educational function such as, for example, teacher's meetings; cultural, scientific or other such student society meetings; and nonregularly scheduled events such as pep rallies incidental to athletic contests.

3. *Use Tax*—Generally an institution of education shall not be liable for use tax if the storage, use or other consumption of the subject property is directly within the educational function of the school concerned; however, if the storage, use or other consumption is for some object outside of the educational function, then there shall be liability for the use tax.

KRS 139.100, 139.330, 139.470(1).

SU 14-1:

Religious Institutions. The intent of this regulation is to reconcile the administration by the Department of Revenue of the provisions of Chapter 139.470(1) KRS, as they apply to sales by retailers to religious institutions.

"Exempt purchaser" as used in this regulation means any church established for public worship within this state, its agencies and its parent or governing body.

Every retailer in determining the amount of gross receipts to be entered on Line 1 of his Kentucky Sales and Use Tax Return shall include therein his total receipts from sales to "exempt purchasers". Every retailer may, subject to the provisions stated herein, deduct from gross receipts the receipts from all sales to "exempt purchasers" of tangible personal property of a kind which could be purchased by said "exempt purchasers" either within or without the State of Kentucky and which if purchased out of this state or in interstate commerce would be exempt from both sales and use tax, although stored, used, or consumed by the "exempt purchaser" in this state. The retailer shall be liable for the sales tax upon his gross receipts from such sales unless he receives from the "exempt purchaser" a valid "purchase exemption certificate" on a form prescribed by the Department.

Every retailer making sales of the kind described above shall require an officer or a person exercising comparable authority of the "exempt purchaser" to sign and acknowledge in writing upon a copy of the invoice that delivery of the property was actually made to an "exempt purchaser". Such invoice shall be retained by the retailer as documentary evidence in support of his deduction of the sale from gross receipts. Each invoice shall also have stated thereon the exemption number of the "exempt purchaser", which number shall have been assigned to the "exempt purchaser" upon written application to the Department of Revenue for authorization to make exempt purchases.

The sales tax shall apply to the gross receipts from the sale of tangible personal property and all other retail sales included in KRS 139.100 to an "exempt purchaser" when such tangible personal property or service is of a kind that ordinarily cannot be purchased out of this state or by means

of an interstate sale. Examples of such sales are sales of natural, artificial, and mixed gas, electricity, water, sewer services, and intrastate telephonic and telegraphic communications and services.

The church is considered the consumer of all meals, food and drink served in connection with its religious activities. Sales by churches of tangible personal property other than meals, food and drink served in connection with its religious activities are subject to sales tax.
KRS 139.470.

SU 38:

Sales to and by the State, Its Agencies and Instrumentalities; and Its Political Subdivisions: Use Tax. Sales Tax—Sales to and by the state, its agencies and instrumentalities, and its political subdivisions (e.g. counties and municipalities) must be included in the taxable gross receipts of the seller.

Use Tax—Except as provided in SU 12-1, the storage, use, or consumption of its agencies and instrumentalities, and its political subdivisions are subject to the use tax.
KRS 139.200, 139.310, 139.470.

SU 90:

Deductions for Sales to Institutions and Agencies Exempt from Use Tax under Kentucky or Federal Constitutions. The intent of this regulation is to reconcile administration by the Department of Revenue of the provisions of Chapter 139, Kentucky Revised Statutes, as they apply to sales by retailers to institutions of purely public charity, non-profit charitable hospitals, institutions of education, and exempt federal agencies with the requirements of the Fourteenth Amendment to the Constitution of the United States and of Section 170 of the Constitution of Kentucky.

"Exempt purchaser" as used in this regulation means only:

1. "Institutions of purely public charity" as defined in SU 13-1;

2. "Institutions of education" as defined in SU 12-1;

3. "Hospitals" as defined in SU 10-1; or,

4. Federal agencies, instrumentalities or corporations which are exempt from state taxation under the Federal Constitution or statutes.

Every retailer in determining the amount of gross receipts to be entered on line 1 of his Kentucky Sales and Use Tax Return shall include therein his total receipts from sales to "exempt purchasers". Every retailer may, subject to the provisions stated herein, deduct from gross receipts the receipts from all sales to "exempt purchasers" of tangible personal property of a kind which could be purchased by said "exempt purchasers" either within or without the State of Kentucky and which if purchased out of this state or in interstate commerce would be exempt from both sales and use tax, although stored, used, or consumed by the "exempt purchaser" in this state. The retailer shall be liable for the sales tax upon his gross receipts from such sales unless he receives from the "exempt purchaser" a valid "purchase exemption certificate" on a form prescribed by the Department.

Every retailer making sales of the kind described above shall require an officer or a person exercising comparable authority of the "exempt purchaser" to sign and acknowledge in writing upon a copy of the invoice that delivery of the property was actually made to an "exempt purchaser". Such invoice shall be retained by the retailer as documentary evidence in support of his deduction of the sale from gross receipts. Each invoice shall also have stated thereon the exemption number of the "exempt purchaser", which number shall have been assigned to the "exempt purchaser" upon written application to the Department of Revenue for authorization to make exempt purchases. Except in the case of exempt federal agencies, no purchaser shall be per-

mitted to execute a valid "purchase exemption certificate" until application for exemption has been received and approved by the Department.

The sales tax shall apply to the gross receipts from the sale of tangible personal property and all other retail sales included in KRS 139.100 to an "exempt purchaser" when such tangible personal property or service is of a kind that ordinarily cannot be purchased out of this state or by means of an interstate sale. Examples of such sales are sales of natural, artificial, and mixed gas, electricity, water, sewer services, and intrastate telephonic and telegraphic communications and services.

KRS 139.110, 139.330, 139.470(1), 139.560.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 259

KENNEDY BOOK STORE, INC., ----------Petitioner,

versus

DEPARTMENT OF REVENUE;
DEPARTMENT OF REVENUE, EX REL. JAMES E. LUCKETT, Commissioner of Revenue;
JAMES E. LUCKETT, Commissioner of Revenue; and
KENTUCKY BOARD OF TAX APPEALS, ----------Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

JOHN B. BRECKINRIDGE
Attorney General
Commonwealth of Kentucky

WILLIAM S. RILEY
Assistant Attorney General
Commonwealth of Kentucky

CYRIL E. SHADOWEN
ALEX W. ROSE

ATTORNEYS FOR RESPONDENT
Commonwealth of Kentucky
Department of Revenue
Frankfort, Kentucky 40601

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IN THE

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No. 1691

KENNEDY BOOK STORES, INC., ----------Petitioner,

versus

DEPARTMENT OF REVENUE;
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

QUESTION PRESENTED

Respondent is not satisfied with Petitioner's statement of the question presented. Simply stated the question presented is as follows:

Whether the Fourteenth Amendment to the Federal Constitution which requires a state to grant equal protection of the laws to any person within its jurisdiction entitles a corporation operating a private bookstore for profit to the same tax treatment as a competitive college bookstore operated by an agency of the Commonwealth of Kentucky.

COUNTERSTATEMENT OF THE CASE

The Petitioner, Kennedy Book Store, Inc., has operated an "off campus" college bookstore across the street from the University of Kentucky in direct competition with the "on campus" bookstore operated by the University of Kentucky. Kennedy Book Store, Inc., (hereinafter referred to as "Kennedy") is privately owned and operated for profit. The University of Kentucky bookstore is operated by the University of Kentucky, which is a public educational institution owned by the Commonwealth of Kentucky. Needless to say both the Commonwealth of Kentucky and the University of Kentucky are nonprofit institutions, but the bookkeeping records did show a profit for the University bookstore during the period in question.

Kennedy has not and does not claim that it is exempt from the sales tax imposed by the Commonwealth under any constitution or statutory provision of Kentucky or under any regulation promulgated by the Department of Revenue of the Commonwealth of Kentucky. It merely contends that the Commonwealth of Kentucky by means of its tax policies cannot operate a college bookstore in a manner that results in a competitive advantage over Kennedy. Having failed to obtain tax relief from the duly constituted administrative agencies and the courts of the Commonwealth it now seeks relief from the United States Supreme Court on the theory that the rights accorded to it under the Fourteenth Amendment to the Federal Constitution are being violated. Kennedy contends that the relief to which it is allegedly entitled can be accomplished by either (1) requiring the University of Kentucky to pay sales tax or (2) by exempting Kennedy from paying sales tax.

REASONS FOR DENYING THE WRIT

I.

The Fourteenth Amendment Guarantees Equal Protection of the Laws Only to Persons of the Same Class. Kennedy and

the University of Kentucky Are Not Persons of the Same Class.

The Department of Revenue, throughout the course of this litigation, argued that the University of Kentucky is exempt from the payment of sales tax by virtue of Section 170 of the Kentucky Constitution. Kennedy did not take issue with this contention. The Kentucky Court of Appeals took note of this fact in the instant case, Ky., 450 SW2d 524 (1970) at page 526 stating as follows:

> "In taking this approach Kennedy *assumes* as does the Department, that UK is an exempt vendor because of Section 170 of the Kentucky Constitution." (Emphasis by the Court).

The pertinent part of Section 170 of the Kentucky Constitution in reference to exemptions from taxation reads as follows:

> "There shall be exempt from taxation . . . institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education . . . ."

If the Kentucky Constitution provides an exemption to the University of Kentucky without providing a similar exemption to Kennedy, such exemption granted to the University establishes a valid classification for the purpose of taxation and does not violate the Fourteenth Amendment to the Federal Constitution. Kennedy is a privately owned corporation operated for profit. The University of Kentucky, on the other hand, is a nonprofit institution of higher learning operated by the Commonwealth of Kentucky.

In reference to the classification of subjects of taxation this Court in the case of *State Bd. of Tax Commissioners* v. *Jackson*, 283 U. S. 527 (1931), beginning at page 537 stated as follows:

> "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the

states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688, Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S., 30 S. Ct. 578, 580:

"'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the Legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

The Petitioner's contention that it is entitled to the identical treatment accorded the University of Kentucky would have merit if it were a person of the same class as the University, but obviously it is not. As stated above Kennedy is a privately owned corporation operated for profit. The University of Kentucky is a nonprofit educational institution operated by an agency of the Commonwealth of Kentucky. The Commonwealth has properly assumed the duty of providing for its citizens institutions of higher education. The tax exemption granted to institutions of education by Section 170 of the Kentucky Constitution relieves the taxpayers of the Commonwealth from a portion of the burden of supporting such institutions. This constitutional exemption from taxes is clearly a reasonable one. The resulting difference in classification for tax purposes between the privately owned Kennedy bookstore and the state owned bookstore is neither capricious nor arbitrary. The classification involved herein is based on reasonable distinctions and thus there is in this case no denial of equal protection of the laws.

II.

The Equal Protection Clause of the Fourteenth Amendment Does Not Protect Kennedy From Injurious Competition by a Tax Exempt Agency of the Commonwealth of Kentucky.

Assuming, without admitting, that the Kentucky Department of Revenue has the power and authority to grant Kennedy relief from the sales tax, the department has not contravened the Fourteenth Amendment to the Federal Constitution by its refusal to do so. The equal protection clause does not forbid discrimination with respect to things that are different or prohibit competition from an exempt agency of the sovereign. The Kentucky Constitution grants an exemption to the University of Kentucky. At the time this dispute arose there was no constitutional, statutory or administrative exemption granted to Kennedy (the Kentucky Legislature in 1970 did provide statutory relief for Kennedy).

This question was settled by this Court in the case of *Puget Sound Power and Light Company* v. *Seattle*, 291 U. S. 619 (1934). Mr. Justice Stone, speaking for the Court beginning at page 623, stated as follows:

> "There is no contention that appellant's franchise or any contract relieves it generally from the duty of paying taxes. It is not contended that a state or municipality, merely because it fails or is unable to tax its own property or business, is prohibited from taxing like property or business. The contention here is that constitutional limitations are transgressed only because the tax affects a business with which the taxing sovereign is actively competing. For that reason it is argued that the taxation involves a forbidden discrimination and deprives appellant of its property without due process since the combined power of the city to tax and to compete may be used to destroy appellant's business. As appellant asserts that the tax can impose no effective burden on the city, its contention is, in effect, that the city, by virtue of the Fourteenth Amendment, upon entering the business forfeited its power to tax any competitor.
>
> "In conducting the business by state authority the city is exercising a part of the sovereign power of the state which the Constitution has not curtailed. The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L.R.A.1918C, 765, Ann. Cas. 1918E, 660, and compete with private interests engaged in a like activity. Standard Oil Co. v. Lincoln, 114 Neb. 245, 207 N. W. 172, 208 N. W. 962, affirmed per curiam 275 U. S. 504, 72 L. ed. 395, 48 S. Ct. 155, supra; Madera Waterworks v. Madera, 228 U. S. 454, 57 L. ed. 915, 33 S. Ct. 571; Helena Waterworks Co. v. Helena, 195 U. S. 683, 47 L. ed. 245, 25 S. Ct. 40.
>
> "We need not stop to inquire whether the equal

protection clause was designed to protect the citizen from advantages retained by the sovereign, or to point out the extra-ordinary implications of appellant's argument when applied to expansions of government activities which have become commonplace. It is enough for present purposes that the equal protection clause does not forbid discrimination with respect to things that are different. The distinctions between the taxing sovereign and its taxpayers are many and obvious. The private corporation, whatever its public duties, carries on its business for private profit and is subject to the obligation, common to all, to contribute to the expense of government by paying taxes. The municipality, which is enabled to function only because it is a tax gatherer, may acquire property or conduct a business in the interest of the public welfare, and its gains if any must be used for public ends. Hence equal protection does not require a city to abstain from taxing the business of a corporation organized for profit merely because in the public interest the municipality has acquired like property or conducts a like business.

"These differences are not lessened nor the constitutional exaction of uniformity increased because the city competes with a business which it taxes."

This Court noted in the above case that equal protection of the laws does not forbid discrimination between things that are different and that the distinctions between the taxing sovereign and its taxpayers are many and obvious. It may also be stated that the distinctions between the sovereign operating a bookstore as part of a nonprofit state university and a private corporation operating a bookstore solely for profit are many and obvious.

If exemption from sales tax grants the University of Kentucky an unfair advantage over Kennedy within the purposes and intent of the Fourteenth Amendment, such logic would also require the University to pay state income tax and state and local ad valorem property taxes on its bookstore operation just

as Kennedy must pay such taxes. This course of reasoning would also require that such additional taxes be imposed upon non-profit colleges teaching courses in shorthand, typing, accounting, business law and similar subjects in order to protect private business colleges operated for profit from unfair competition. Needless to say, it is well settled that the Fourteenth Amendment does not require such equal tax treatment.

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

JOHN B. BRECKINRIDGE
Attorney General
Commonwealth of Kentucky

WILLIAM S. RILEY
Assistant Attorney General
Commonwealth of Kentucky

CYRIL E. SHADOWEN
ALEX W. ROSE

ATTORNEYS FOR RESPONDENT
Commonwealth of Kentucky
Department of Revenue
Frankfort, Kentucky 40601

CERTIFICATION:

I hereby certify that on this 2d day of July, 1970, a copy of this Brief in response to Petitioner's petition for writ of certiorari was mailed to each counsel for Petitioner.

William S. Riley

WILLIAM S. RILEY